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Injunctions -- Courts -- Injunction Against Threatened Violation of Agreement Not to Sue

Philip E. Lucas

ing the claim of the widow. Then the subsequent addition of the widow's claim will have one of two inequitable results: (1) If all the liabilities computed in the pro-rata are paid at once, the estate will be exhausted, having nothing for the subsequent claim of the widow, or (2) if only the mortgagee be paid and the widow's claim then thrown in with the other unpaid creditors, it will reduce their pro-rata share, thereby making the mortgagee's claim preferred to those of other creditors of equal rank. Under the first procedure it is impossible to avoid this problem, because if the mortgagee draws on the personalty, dower cannot remain untouched, for the insolvent estate pays only a ratable share, thus leaving a residue of debt which will ultimately bring in the widow as creditor. However, if the second method be used, all the claims are definite and simultaneously computable, thus facilitating the administration of estates and correcting the inequities arising from two computations.

Accordingly, it is recommended that North Carolina follow its precedents in allowing priority only in a surplus existing after satisfaction of the mortgage debt, and that the intimation of the principal case receive no embodiment in our law.

J. KENYON WILSON, JR.

Injunctions—Courts—Injunction Against Threatened Violation of Agreement Not to Sue.

Plaintiffs petitioned Polk County Superior Court to enjoin the husband of one of them from instituting against the other plaintiff a civil action in Forsyth County Superior Court for alienation of plaintiff wife's affections. It was alleged that defendant husband had signed separation papers accompanied by an agreement to refrain from bringing such a suit, that the threatened suit would violate said agreement, and would do irreparable injury to plaintiff wife's character. The trial judge granted a temporary injunction until the final hearing, and defendant appealed. *Held,* affirmed.[1]

The problem of enjoining litigation brought or threatened in violation of an agreement not to sue may involve litigation in the courts of another state,[2] in a local inferior court,[3] or in a court of concurrent jurisdiction with that in which the injunction is sought or in another branch of the same court. This note deals with the latter situation.

Some states by statute[4] or by judicial decision,[5] purport to deprive

[1] Boone v. Boone, 217 N. C. 722, 9 S. E. (2d) 383 (1940).
[2] Note (1935) 13 N. C. L. REV. 235.
[3] Bomeisler v. Forster, 154 N. Y. 229, 48 N. E. 534 (1897).
[4] Judicature Act, 1873, 36 & 37 Vict., c. 66; 17 HALSBURY, LAWS OF ENGLAND (1911) 261.
[5] State v. Rightor, 39 La. Ann. 619, 2 So. 385 (1887); Schumert-Warfield-Buja, Inc. v. Buie, 148 La. 726, 87 So. 726 (1921); Kuhn v. Beard, 151 La. 546, 92

the courts of power to entertain an independent action for injunction. Particularly is this so when the litigation is pending in a court which has taken jurisdiction[6] and which can afford adequate relief by equitable defense.[7] Other states, however, concede that power exists[8] to enjoin the litigation in an independent action but hold that it is error[9] to exercise it save in the exceptional case where an equitable defense or counterclaim in the same action will not sufficiently help.[10] Both lines of cases are motivated by a desire to conserve the economy of judicial administration[11] in a concurrent or single judicial system. The distinction between a void injunction and an erroneous one is vital in contempt proceedings.[12]

So. 52 (1922); Grant v. Quick, 5 Sandf. 612 (N. Y. 1852); Bennet v. Le Roy, 14 How. Pr. 178 (N. Y 1857); Winfield v. Bacon, 24 Barb. 154 (N. Y. 1857); Nielson v. Schiller, 92 Utah 137, 66 P. (2d) 365 (1937). But see note 10, *infra*.

[6] State v. District Court, Fourth Judicial Dist., 195 Minn. 169, 262 N. W. 155 (1935); Mo. REV. STAT. (1919) §1951, Wabash Ry. v. Sweet, 103 Mo. App. 267, 77 S. W. 123 (1903); Childs v. Martin, 69 N. C. 126 (1873); Young v. Rollins, 85 N. C. 485 (1881).

[7] Anthony v. Dunlap, 8 Cal. 27 (1857); Wilson v. Baker, 64 Cal. 475, 2 Pac. 253 (1884); S. C. CODE (1932) §6004, Aetna Casualty & Surety Co. v. Yance, 181 S. C. 369, 187 S. E. 536 (1936).

[8] Engels v. Lubeck, 4 Cal. 31 (1854); Meredith v. Crowder, 81 Ind. App. 221, 142 N. E. 876 (1924); Williams v. Payne, 150 Kan. 462, 94 P. (2d) 341 (1939); Davison v. Hough, 165 Mo. 561, 65 S. W. 731 (1901); Capitain v. Mississippi Valley Trust Co., 240 Mo. 484, 144 S. W. 466 (1912); State ex rel. Terry v. Allen, 308 Mo. 230, 271 S. W. 469 (1925); Erie Ry. v. Ramsey, 45 N. Y. 637 (1871); Van Sinderen v. Lawerence, 50 Hon. 272, 3 N. Y. Supp. 25 (1888); Metropolitan Trust Co. v. Stalla, 166 App. Div. 639, 152 N. Y. Supp. 183 (1st Dep't 1915).

[9] Bickett v. Johnson, 8 Cal. 34 (1857); Wilson v. Baker, 64 Cal. 475, 2 Pac. 253 (1884); Galey v. Board of Com'rs., 174 Ind. 181, 91 N. E. 593 (1910); State v. District Court, Fourth Judicial Dist., 195 Minn. 169, 262 N. W. 155 (1935); Wabash Ry. v. Sweet, 103 Mo. App. 267, 77 S. W. 123 (1903); Burke v. Burke, 212 N. Y. 303, 160 N. E. 62 (1914); Rosenberg v. Mount Carmel Cemetery Ass'n., 244 N. Y. 573, 155 N. E. 902 (1927); McReynolds v. Harshaw, 37 N. C. 195 (1842); Childs v. Martin, 69 N. C. 126 (1873); Young v. Rollins, 85 N. C. 485 (1881); Davis v. Federal Land Bank, 217 N. C. 145, 7 S. E. (2d) 373 (1940); Aetna Casualty & Surety Co. v. Yance, 181 S. C. 369, 187 S. E. 536 (1936).

[10] Erie Ry. Co. v. Ramsey, 45 N. Y. 637 (1871). *Cf* note 5, *supra*.

[11] Conversely, for this same reason, the court first taking jurisdiction sometimes finds it necessary to enjoin other litigation respecting the same subject matter. Davison v. Hough, 165 Mo. 561, 65 S. W. 731 (1901); Capitain v. Mississippi Valley Trust Co., 240 Mo. 484, 144 S. W. 466 (1912); State ex rel. Terry v. Allen, 308 Mo. 230, 271 S. W. 469 (1925); Van Sinderen v. Lawerence, 50 Hun. 272, 3 N. Y. Supp. 25 (1888); Metropolitan Trust Co. v. Stalla, 166 App. Div. 639, 152 N. Y. Supp. 183 (1st Dep't 1915); See Wabash Ry. v. Sweet, 103 Mo. App. 276, 280, 77 S. W. 123, 124 (1903); Erie Ry. v. Ramsey, 45 N. Y. 637, 647 (1871).

[12] Pitcock v. State, 91 Ark. 527, 121 S. W. 742 (1909); People v. Barrett, 203 Ill. 99, 67 N. E. 742 (1903); State v. Meyer, 86 Kan. 793, 122 Pac. 101 (1912); Saginaw Lumber & Salt Co. v. Griffore, 145 Mich. 287, 108 N. W. 681 (1906); McHenry v. State, 91 Miss. 562, 44 So. 831 (1907); St. Louis, K. & S. Ry. v. Wear, 135 Mo. 230, 36 S. W. 357 (1896); *In re* Knaup, 144 Mo. 653, 46 S. W. 151 (1898); Cauffman v. Van Buren, 136 N. Y. 253, 32 N. E. 775 (1892); Savage v. Sternberg, 19 Wash. 679, 54 Pac. 611 (1898); Cline v. Whitaker, 144 Wis. 439, 129 N. W. 400 (1911).

Where, however, the litigation prohibited by the agreement not to sue has not been instituted but is merely threatened, other considerations, of a *quia timet* nature, become important. Even if an equitable defense might suffice had the suit been brought, it may be that an independent injunction is justified where the very threat of litigation works irreparable harm. For example, such a threat might operate as a cloud on title and frighten away the prospective purchasers of land.[13] If, on the other hand, it is the actual institution of the suit itself which is feared, specific performance of the agreement not to sue, effectuated through an equitable defense[14] to the main suit once it has been brought, would appear to be the appropriate remedy[15] in most cases.

The situation in the principal case does not appear to have warranted independent injunction. Rather, it might better have been left to be dealt with by an equitable defense, based upon the agreement not to sue, to the action for alienation of affections when brought. Such a disposition of the matter would have been more in harmony with the relations necessary between two coordinate branches of the North Carolina Superior Court and with the policy of effectuating, as far as possible, complete relief in the same action. Any notion that the plaintiff wife needed an independent injunction to protect her reputation against the allegations and proofs in the threatened action for alienation of affections is strangely at variance with her own disclosures of misconduct in the injunction suit.

The court relied upon a North Carolina case[16] of injunction against litigation in the courts of another state and a New York case[17] of injunction against litigation pending in a local inferior court. Neither situation parallels that of the principal case. In the first, the North Carolina case, the foreign court was not in a reciprocal position. In the second, the *Bomeisler* case, the litigation enjoined was pending in the superior court of the city of New York and not in another branch of the state-wide supreme court. The opinion does not deal with the fact that as between such branches independent injunctions against litigation, once regarded as nullities,[18] are now held, unless indispen-

[13] N. C. CODE ANN. (Michie, 1939) §1743, Power Co. v. Power Co., 175 N. C. 668, 96 S. E. 99 (1918).

[14] N. C. CODE ANN. (Michie, 1939) §519, Russell v. Adderton, 64 N. C. 417 (1870); Harshaw v. Woofin, 64 N. C. 568 (1870); Evans v. Roper, 74 N. C. 639 (1876); Craven v. Freeman, 82 N. C. 361 (1880); MCINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §461(6).

[15] MCINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §862, n. 87; Burke v. Burke, 212 N. Y. 303, 106 N. E. 62 (1914).

[16] Wierse v. Thomas, 145 N. C. 261, 59 S. E. 58 (1907). See note 2, *supra*.

[17] Bomeisler v. Forster, 154 N. Y. 229, 48 N. E. 534 (1897).

[18] Grant v. Quick, 5 Sandf. 612 (N. Y. 1852); Bennet v. Le Roy, 14 How. Pr. 178 (N. Y. 1857); Winfield v. Bacon, 24 Barb. 154 (N. Y. 1857).

sable, to be erroneous and reversible upon appeal.[19] Moreover, two suits had begun following two successive settlements, and the court felt that a mere defense to the pending action would not effectively prevent the repetition of this persistent persecution. Finally, the New York court has since reversed an injunction against an action pending, in violation of a settlement, in another branch of the supreme court; compelled resort to a defense in that action, even though the complaint therein attacked the character of the plaintiff in the injunction suit; and restricted the *Bomeisler* case to its special facts.[20]

It is submitted that the principal case unnecessarily complicates the North Carolina procedure.

PHILIP E. LUCAS.

Receiverships—Priority of Operating Expenses Over Secured Creditors in the Corpus.

At the instance of parties other than the secured creditors a lumber corporation was put in the hands of a receiver with authority to continue the business. The court ordered the receiver to sell certain lumber, which was the sole asset of the company, and which had been pledged to appellants (secured creditors). The court further ordered the receiver to retain twenty percent of the money realized from the sale to pay the expenses of the receivership and to remit the balance to the secured creditors. *Held,* order affirmed. Where a receivership enures to the benefit of a lienholder, his lien is subordinate to the administrative expenses.[1]

In *Fosdick v. Schall,*[2] the United States Supreme Court adopted the rule that in railroad receiverships the operating expenses have a priority in payment out of the current income over the mortgagees of the corpus, and a payment to the mortgagees out of the current income is a diversion which gives the operating expenses a priority on the corpus equal in amount to the diversion. The court declared that railroads were affected with such vital public interest that they were obligated to continue operation. This rule has been unanimously followed as to railroads,[3] and later cases have added that if the current income be in-

[19] Erie Ry. Co. v. Ramsey, 45 N. Y. 637 (1871); Burke v. Burke, 212 N. Y. 303, 106 N. E. 62 (1914).

[20] Burke v. Burke, 212 N. Y. 303, 106 N. E. 62 (1914).

[1] Wood v. Woodbury & Pace, Inc., 217 N. C. 356, 8 S. E. (2d) 240 (1940).

[2] 99 U. S. 235, 25 L. ed. 339 (1878).

[3] Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. ed. 596 (1884); Calhoun v. St. Louis & S. E. Ry., 14 Fed. 9 (C. C. D. Ind. 1880); Clark v. Central R. R. & Banking Co., 66 Fed. 803 (C. C. A. 5th, 1895); Central Bk. & Tr. Co. v. Greenville & Western R. R., 248 Fed. 350 (W. D. S. C. 1918); Central Tr. Co. of N. Y. v. Pittsburg S. & N. R. R., 223 N. Y. 347, 119 N. E. 565 (1918); McIlhemey v. Bing, 80 Tex. 4, 13 S. W. 655 (1890); Bellingham Bay Improv. Co. v. Fairhaven & N. W. Ry., 17 Wash. 371, 49 Pac. 514 (1897).